DATE: April 12, 1994
CASE NO. 89-ERA-40

IN THE MATTER OF

GEORGE M. GILLILAN,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER DISAPPROVING SETTLEMENT
AND REMANDING CASE

On February 26, 1990, pursuant to the parties' request under Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the Administrative Law Judge (ALJ) recommended dismissal of this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Upon review, however, the Secretary found indications that the parties' request for dismissal may have been based on a settlement agreement. Under the ERA, a settlement negotiated and agreed to by the parties also must be "entered into," *i.e.*, approved by the Secretary as fair, adequate, and reasonable to settle the employee's allegations that the employer violated the ERA. 42 U.S.C. § 5851(b)(2)(A); *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Porter v. Brown & Root, Inc.*, Case No. 91-ERA-4, Sec. Ord., Feb. 25, 1994, slip op. at 6-7; *see Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2. The Secretary, therefore, ordered the parties to submit the settlement agreement for the Secretary's approval, if indeed a settlement prompted the request for dismissal. *See* Order to Submit Settlement dated January 2,

1991.

In response, the parties filed a Conciliation Agreement

which they had executed on January 31, 1990. While the agreement was pending review by the Secretary, Complainant moved to disapprove the proposed settlement and to remand the action to the ALJ. Respondent filed a brief opposing Complainant's motion.

The Secretary repeatedly has held that a party cannot withdraw from a settlement after agreeing to it, or oppose approval of it, at any time up to the time the Secretary approves it. *E.g.*, *Porter*, slip op. at 5; *McFarland v. City of New Franklin, Missouri*, Case No. 86-SWD-00001, Sec. Ord., Aug. 17, 1993, slip op. at 5; *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Ord., Nov. 14, 1989, slip op. at 14-16, *rev'd on other grounds sub nom.*, *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991). Complainant argues that he is not now repudiating the settlement but is requesting the Secretary to review its terms under current conditions. Complainant maintains that the settlement agreement should be disapproved because it is no longer fair, adequate, and reasonable in view of changed circumstances. According to Complainant, Respondent has taken unilateral action to disable itself from performing the obligations it voluntarily undertook in the settlement agreement and Complainant will not realize all the benefits of his settlement for which he gave consideration. [1]

Respondent counters that Complainant knew of the purported "changed circumstances" at the time he submitted the agreement to the Secretary for approval and that he complains now only as a litigation tactic. Respondent adds that Complainant voluntarily consented to the agreement and accepted and retains its benefits and has not provided a valid basis to disapprove the settlement.

Complainant is not denying that in January 1990, he knowingly and voluntarily negotiated and agreed to the agreement, nor is he claiming that its terms are unfair, or that Respondent engaged in fraud. Rather, I view Complainant's claim as simply a premature assertion that Respondent has breached the agreement, which is an insufficient reason to disapprove the settlement. *O'Sullivan v. Northeast Nuclear Energy Co.*, Case Nos. 90-ERA-35, 36, Sec. Ord., Dec. 10, 1990, slip op. at 3. A settlement under the ERA is an executory contract, which is binding on the parties until the Secretary acts on it. *McFarland*, slip op. at 5. But until the Secretary approves the settlement, the parties are not obligated to fulfill its terms for purposes of the ERA. *Macktal v. Brown & Root, Inc.* (*Macktal II*), Case No. 86-ERA-23, Sec. Ord., Oct. 13, 1993, slip op. at 6 n.3.

In any event, this settlement agreement cannot be approved. The agreement specifically provides:

> Should the Administrative Law Judge and/or Secretary of

> Labor determine that this agreement cannot be reviewed in camera, that the files related hereto cannot be sealed and/or that any term of this agreement cannot remain confidential in accordance with this agreement, then this entire agreement shall be null and void, and the parties will proceed with a hearing.

Conciliation Agreement at 3, Paragraph 4. *See also* Letter on behalf of both parties, dated January 17, 1991, from

Justin M. Schwamm, Sr., Assistant General Counsel, Tennessee Valley Authority (requesting that the agreement be kept confidential and that all files concerning it be sealed).

As more fully explained in *Corder v. Bechtel Energy Corp.*, Case No. 88-ERA-9, Sec. Ord., Feb. 9, 1994, slip op. at 3-5; *Debose v. Carolina Power and Light Co.*, Case No. 92-ERA-14, Sec. Ord., Feb. 7, 1994, slip op. at 2-5; and *Mitchell v. Arizona Public Service Co.*, Case Nos. 92-ERA-28, 29, 35, 55, Sec. Ord., June 28, 1993, slip op. at 2, the files related to this agreement cannot be sealed. The case record, including the settlement agreement, are agency records which are subject to the Freedom of Information Act, 5 U.S.C. § 552 (1988), and the procedures in 29 C.F.R. Part 70 (1993). Unless exempt, such records must be made available for public inspection and copying. Given the express terms of the agreement, making a sealed record essential and not severable, I cannot approve this settlement. *Macktal*, 923 F.2d at 1155; *Macktal II*, slip op. at 6. [2]

Accordingly, this case IS REMANDED to the ALJ for further proceedings consistent with this order, the ERA, and its implementing regulations at 29 C.F.R. Part 24.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Specifically, Respondent discontinued certain training courses that had been promised to Complainant as part of the settlement agreement. Complainant also notes that other disputes have arisen concerning Respondent's implementation of certain provisions of the settlement agreement.

[2] In addition, I note that Paragraph 6 of the Conciliation Agreement, which pertains to enforcement of the agreement, would be interpreted as not limiting the authority of the Secretary or the United States district court under the statute and regulations. 42 U.S.C. § 5851(d); 29 C.F.R. § 24.8(a) (1993); *Porter*, slip op. at 11 n.7.